ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular/PCS Cross-Ownership Rule	)	GN Docket No. 90-314

To: The Commission

PETITION FOR RECONSIDERATION
(EXPEDITED ACTION REQUESTED)

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SUMMARY

By this filing, BellSouth seeks reconsideration of the Commission's determination in its *Report and Order* to continue to include all SMR services in the 45 MHz CMRS aggregation limit in Section 20.6(a) of the Commission's rules. BellSouth requests that the Commission modify Section 20.6(a) to state that only "covered SMR" services are included in the spectrum aggregation limit. Expedited processing of this petition is requested to enable parties interested in participating in the upcoming D, E, and F Block PCS auctions to adequately assess what spectrum is attributable for purposes of determining their eligibility.

In adopting the 45 MHz CMRS spectrum cap, the Commission sought to include in the cap those SMR services which were substantially similar to, and had the potential to compete with, broadband PCS and cellular services. As shown herein, recent decisions in the resale, number portability, E911, and roaming proceedings have defined those SMR services which compete, or have the potential to compete, with broadband PCS and cellular as "covered SMR." Specifically excluded from the definition of covered SMR are local SMR services offering mainly dispatch services to specialized customers in a non-cellular system configuration, licensees offering only data, one-way, or stored voice services on an interconnected basis, or any SMR provider that is not interconnected to the public switched network, since these licensees do not compete substantially with broadband PCS and cellular providers.

Consistent with the Commission's recent decisions in the resale, number portability, E911, and roaming proceedings, BellSouth requests that the Commission reconsider its decision to continue to include all SMR services in the 45 MHz CMRS aggregation cap, and to modify Section 20.6(a) to state that only "covered SMR" services are included within the cap. While the Commission may have initially included *all* SMR services in the Section 20.6(a) CMRS spectrum cap on the grounds that such services have the "potential" to permit SMR operators to offer services that are nearly identical to those offered by both cellular and broadband PCS, the Commission has now stated that it is only *covered* SMR services which compete, or have the potential to compete, with broadband PCS and cellular. Because the original basis for the inclusion of *all* SMR services in the Section 20.6(a) spectrum aggregation is no longer sustainable, the Commission must reevaluate the rule.

Finally, regulatory parity mandates that Section 20.6(a) not include non-covered SMR carriers within the spectrum cap. While cellular, broadband PCS, and covered SMR services are similarly situated and serve the same two-way voice markets, non-covered SMR services are dissimilar. Accordingly, because non-covered SMR carriers are differently situated from, and do not compete or have the potential to compete with, covered SMR carriers, they should be excluded from the 45 MHz CMRS spectrum cap.

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PETITION FOR RECONSIDERATION
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BellSouth Corporation ("BellSouth"), on behalf of its wireless subsidiaries and affiliates, hereby petitions the Commission for reconsideration of its *Report and Order* in WT Docket No. 96-59 and GN Docket No. 90-314, FCC 96-278 (released June 24, 1996), *summarized*, 61 Fed. Reg. 33,859 (July 1, 1996). BellSouth seeks reconsideration of the Commission's decision to continue to include all Specialized Mobile Radio ("SMR") services in the 45 MHz Commercial Mobile Radio Service ("CMRS") aggregation limit in Section 20.6(a) of the Commission's rules.[1] BellSouth requests that the Commission modify Section 20.6(a) to state that only "covered SMR" services are included in the spectrum aggregation limit, consistent with recent decisions in the resale, number portability, E911, and roaming proceedings.[2]

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[1] *See Report and Order* at ¶¶ 94-95.

[2] *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, *First Report and Order*, ¶ 19 (released July 12, 1996) ("*Resale Order*"); *Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, ¶ 155 (released July 2, 1996) ("*Number Portability Order*"), *erratum*, DA 96-1124 (released July 15, 1996), *erratum*, 64044 (released July 17, 1996); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*,

BellSouth hereby seeks expedited processing of this petition.[3] Expedited processing is requested given that the last auctions of available PCS spectrum, the D, E and F Block auctions, are scheduled to commence August 26, 1996.[4] FCC Form 175 applications for these auctions are due July 31, 1996. A prompt decision in this matter will enable parties interested in participating in these upcoming auctions to adequately assess what spectrum is attributable for purposes of determining their eligibility.

DISCUSSION

In the *Report and Order*, the Commission concluded that the cellular/PCS cross-ownership rule previously contained in Section 24.204 of the Commission's rules, as well as the PCS spectrum cap formerly found in Section 24.229(c) of the Commission's rules, should be eliminated.[5] Accordingly, the sole limitation on the amount of cellular, broadband PCS, and SMR spectrum which a licensee can hold in a given geographic area is set forth in Section 20.6(a) of the Commission's rules. Section 20.6(a) states that "[n]o licensee in the broadband PCS, cellular, or SMR services (including all parties under common control) regulated as CMRS (see § 20.9) shall

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FCC 96-264 (released July 26, 1996) ("*E911 Order*"); "FCC Adopts Rules and Further NPRM Regarding Roaming on Cellular, Broadband PCS and Covered SMR Networks," CC Docket No. 94-54, *New Release*, Report No. DC 96-92 (June 27, 1996) ("*Roaming News Release*").

[3] BellSouth, through its affiliate BellSouth Wireless, Inc. ("BWI"), is concurrently filing a "Request for Waiver" of the CMRS spectrum aggregation limit in Section 20.6(a) of the Commission's rules.

[4] BellSouth intends to bid for two 10 MHz broadband Personal Communications Service ("PCS") licenses in the upcoming D and E Block auctions. Absent reconsideration of Section 20.6(a) to include only "covered SMR," BellSouth will be attributed with 0.25 MHz or 0.50 MHz of 900 MHz SMR spectrum held by its affiliate RAM Mobile Data USA Limited Partnership ("RAM Mobile"), which, in connection with other attributable 25 MHz cellular interests, will place it over the 45 MHz CMRS spectrum aggregation limit.

[5] *See Report and Order* at ¶ 94.

have an attributable interest in a total of more than 45 MHz of licensed broadband PCS, cellular, and SMR spectrum regulated as CMRS with significant overlap in any geographic area."[6]

Under Section 20.9(a)(4), SMR services regulated as CMRS are defined as those SMR services which provide interconnected service.[7] As shown below, however, there are sound policy reasons for limiting the definition of "SMR spectrum regulated as CMRS" solely to "covered SMR." These policy reasons can be traced back to the original policies underlying the adoption of Section 20.6(a), and are consistent with the Commission's recent decisions in the resale, number portability, E911, and roaming proceedings.

I. The 45 MHz CMRS Spectrum Aggregation Cap Was Adopted to Promote Competition Among Similar or Potentially Competitive Services and to Prevent the Exercise of Market Power and the Excessive Aggregation of Licenses

Section 20.6(a), in pertinent part, was originally added by the Commission's *CMRS Third Report and Order* in its regulatory parity docket.[8] In that order, the Commission began by stating its conclusion "that mobile services will be treated as substantially similar *if they compete against each other*."[9] This theme resounded repeatedly in the *CMRS Third Report and Order's* discussion of the need for a CMRS spectrum aggregation limit, and spectrum caps generally. Specifically, the Commission justified a CMRS spectrum cap out of concern that "excessive aggregation by any one

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6 47 C.F.R. § 20.6(a).

7 *See* 47 C.F.R. § 20.9(a)(4). As an example, the SMR spectrum utilized by RAM Mobile is interconnected to the public switched network, and therefore under the current language of Section 20.6(a) that spectrum is attributable.

8 *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd. 7988 (1994) ("*CMRS Third Report and Order*").

9 *Id.* at 7996 (emphasis added).

or several CMRS licensees could reduce competition."[10] Accordingly, the Commission adopted a "broad based spectrum cap" in order to "promote competition and prevent the exercise of market power."[11]

In determining which services belonged under the general CMRS spectrum cap, the Commission stated that its focus was on "the ability of a single competitor or group of competitors to control sufficient spectrum so that they could reduce the amount of service available to the public and increase prices for a service or group of services encompassed by CMRS."[12] The Commission cited to commenting parties who generally contended that broadband services that will compete with one another — cellular, PCS, and wide-area (or enhanced) SMR — should be included within the cap, while others which will not compete should be excluded.[13]

With regard to SMR in particular, the Commission stated:

> We reject arguments for not including SMR spectrum within the cap. While current SMRs may at present have low market penetration, the SMR technology holds the potential to permit SMR operators to offer services that are *nearly identical to those offered by both cellular and broadband PCS.*[14]

Thus, from the time the 45 MHz spectrum cap was adopted, the Commission sought to include in the cap those SMR services which were substantially similar to, and had the potential to compete with, broadband PCS and cellular services. As discussed below, the Commission has now defined

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10 *Id.* at 8101.

11 *Id.* at 8104.

12 *Id.* at 8105.

13 *Id.* at 8106.

14 *Id.* at 8109. For purposes of calculating attributable SMR spectrum towards the 45 MHz CMRS cap, the Commission determined to include 900 MHz SMR spectrum because of its potential to offer "high quality mobile telephony service," *i.e.*, two-way voice service. *See id.* at 8116.

those SMR services which compete, or have the potential to compete, with broadband PCS and cellular as "covered SMR."[15]

Unfortunately, while the Commission explicitly excluded from the cap narrowband radio services and mobile satellite services, neither of which were expected to compete with broadband services,[16] it failed to ultimately distinguish between various types of SMR services which would compete directly with cellular and broadband PCS, such as wide-area SMR, from those SMR services which would not compete, such as local dispatch service, mobile data service, or one-way interconnected service. Thus, Section 20.6(a), as adopted, instituted a 45 MHz aggregate spectrum cap simply with regard to broadband PCS, cellular, and SMR in general.[17]

II. Recent Decisions Demonstrate that "Covered" SMR Services that Compete, or Have the Potential to Compete, With Broadband PCS and Cellular Should Be Treated Differently From Non-Covered SMR Services

Although Section 20.6 as a whole has been amended on several occasions since the *CMRS Third Report and Order*,[18] there have been no significant changes in the language in subsection (a) of the rule at issue here. However, the Commission has recently drawn clear distinctions between various types of SMR services in several recent decisions.

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15 *See infra* text accompanying notes 19-20, 25, 27-28.

16 *CMRS Third Report and Order*, 9 FCC Rcd. at 8106, 8111-12.

17 *Id.* at 8108-09. Interestingly, the Commission concluded that its action was "consistent with the intent of Congress insofar as it establishes effective parity in the eligibility requirements for cellular and *wide-area* SMRs for PCS spectrum." *Id.* at 8110 (emphasis added). This wide-area distinction, however, was not made a part of the final rule Section 20.6(a).

18 *See Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Fourth Report and Order*, 9 FCC Rcd. 7123 (1994) (adding new subsections (d)(9) and (d)(10) to Section 20.6 to make management and joint marketing agreements attributable where such agreements confer the ability to influence price or service offerings); *id., Sixth Report and Order*, 11 FCC Rcd. 136 (1995) (amending Section 20.6(d)(2) to make the 40 percent attribution threshold for the CMRS spectrum cap applicable to interests held by small businesses and rural telephone companies).

In the *Resale Order*, the Commission addressed the question of whether to extend its cellular resale obligation — which prohibits cellular carriers from prohibiting resale of their services or discriminating against resellers — to other CMRS providers. The Commission concluded that "covered SMR providers" should be governed by the Commission's resale policy "because such providers have significant *potential to compete* directly with cellular and broadband PCS providers."[19] Thus, the Commission has now clearly stated that "covered SMR" services are those which compete, *or have the potential to compete*, with broadband PCS and cellular.[20]

The definition of "covered SMR" is set forth in new Section 52.1(c) of the Commission's rules, and includes

> 800 MHz and 900 MHz SMR licensees that hold geographic area licenses or incumbent wide area SMR licenses that offer real-time, two-way switched voice service that is interconnected with the public switched network, either on a stand-alone basis or packaged with other telecommunications services. *This term does not include local SMR services offering mainly dispatch services to specialized customers in a non-cellular system configuration, licensees offering only data, one-way, or stored voice services on an interconnected basis, or any SMR provider that is not interconnected to the public switched network.*[21]

Licensees of non-covered SMR services, including those licensees which offer only data services, were specifically excluded "[b]ecause they do not compete substantially with cellular and broadband PCS providers."[22] This notion of competition among like broadband CMRS services, which typically provide two-way switched voice service, being used as the yardstick for measuring those carriers' resale obligations is analogous to the Commission's consideration of which like competitive services to include in the CMRS spectrum cap discussed above.

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19 *Id.* at ¶ 19 (emphasis added).

20 *See supra* text accompanying notes 14-15.

21 47 C.F.R. § 52.1(c) (emphasis added); *see Resale Order* at ¶ 19.

22 *Id.*

Similarly, in the number portability proceeding, the Commission was faced with the extent to which it should require CMRS providers to provide long-term number portability. It concluded that cellular, broadband PCS, and covered SMR providers should be required to provide number portability.[23] Specifically excluded were paging and other messaging services and local SMR licensees offering mainly dispatch services in a non-cellular system configuration.[24] The Commission based its conclusion "on our view . . . that cellular, broadband PCS, and covered SMR providers will compete directly with one another, and potentially will compete in the future with wireline carriers."[25] Again, the Commission concluded that it is those SMR services which compete or have the potential to compete with broadband PCS and cellular which comprise covered SMR and should be regulated in a like manner, while non-covered SMR services were specifically excluded from this regime.

Most recently, the Commission adopted new policies concerning the operation of 911 and enhanced 911 ("E911") emergency calling services, requiring that wireless telephones operate effectively with E911 systems.[26] These requirements were imposed upon cellular, broadband PCS, and covered SMR providers "because these carriers *may have significant potential* to offer near-term direct competition to cellular and broadband PCS carriers."[27] However, "local SMR licensees, offering mainly dispatch services to specialized customers in a more localized, non-cellular system configuration, as well as licensees offering only data, one-way, or stored voice services on an

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23 *Number Portability Order* at ¶ 155.

24 *Id.* at ¶ 156.

25 *Id.* at ¶ 155.

26 *See E911 Order*.

27 *Id.* at ¶ 81 (emphasis added).

interconnected basis, would not be governed by these E911 requirements" because they "do not compete substantially with cellular and broadband PCS providers."[28]

Finally, the Commission has also issued a news release announcing the adoption of new rules extending its cellular manual roaming policy "to require cellular, broadband personal communications services (PCS) and covered specialized mobile radio (SMR) licensees to provide 'manual' roaming service on request to any subscriber whose handset is technically capable of accessing their systems."[29] In adopting this new roaming requirement, the Commission defined covered SMR service providers as "licensees in the 800 MHz and 900 MHz bands providing real time, two-way switched, interconnected voice service."[30] The Commission concluded that the rule should be extended "to include broadband PCS and covered SMR licensees because they compete directly with cellular providers in the two-way switched voice mass market."[31]

III. No Reasonable Policy Basis Exists to Include *all* SMR Services in the CMRS Spectrum Aggregation Cap, While Number Portability, Resale, E911, and Roaming Obligations are Imposed only on Covered SMR Providers

Taken together, these decisions clearly establish a sound policy basis for distinguishing between various types of non-similar SMR services. In other words, covered SMR services, which offer real-time, two-way switched voice service interconnected with the public switched network, are distinguishable from other SMR licensees which offer only data, one-way, or stored voice services on an interconnected basis or which offer mainly local dispatch services in a non-cellular

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28 *Id.*

29 *Roaming News Release* at 1.

30 *Id.*

31 *Id.*

configuration.[32] While the former (covered) SMR services compete or have the potential to compete directly with broadband PCS and cellular services, the latter do not substantially compete with such services, as the Commission recently recognized in its resale, number portability, E911, and roaming proceedings. Thus, there appears to be no reasoned explanation for continuing to include *all* SMR carriers in the CMRS spectrum aggregation cap, while imposing in the resale, number portability, E911, and roaming obligations only on covered SMR providers.[33]

While the Commission may have initially included all SMR services in the Section 20.6(a) CMRS spectrum cap on the grounds that such services have the "potential to permit SMR operators to offer services that are nearly identical to those offered by both cellular and broadband PCS,"[34] the Commission has now said in its resale, number portability, and E911 dockets that it is only *covered* SMR services which compete, or have the potential to compete, with broadband PCS and cellular.[35] Thus, the original basis for the inclusion of *all* SMR services in the Section 20.6(a) spectrum aggregation cap — potential competition with broadband PCS and cellular — is no longer sustainable on such a broad scale.

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32 *See Resale Order* at ¶ 19; *E911 Order* at ¶ 81.

33 Although the Commission noted in its *Report and Order* that the 45 MHz spectrum cap was adopted to encourage competition, it failed to address the continued inclusion of all SMR services within the cap, even when non-covered SMR services have been shown not to compete with the broadband services for which the cap was adopted. *See Report and Order* at ¶¶ 94-95.

34 *CMRS Third Report and Order*, 9 FCC Rcd. at 8109.

35 *See Resale Order* at ¶ 19 (concluding that "covered SMR providers" should be governed by the Commission's resale policy "because such providers have significant potential to compete directly with cellular and broadband PCS providers"); *Number Portability Order* at ¶ 155 (stating that "cellular, broadband PCS, and covered SMR providers will compete directly with one another, and potentially will compete in the future with wireline carriers"); *E911 Order* at ¶ 81 (holding that E911 requirements were being imposed upon cellular, broadband PCS, and covered SMR providers "because these carriers may have significant potential to offer near-term direct competition to cellular and broadband PCS carriers").

Courts have held that where the basis for a rule no longer exists, the Commission must reevaluate the rule.[36] Accordingly, the Commission should seize the opportunity to do so in this case by acting promptly on reconsideration to revise the 45 MHz spectrum cap in Section 20.6(a) to include within the cap only those services which actually compete with one another — broadband PCS, cellular, and *covered* SMR services.

IV. Regulatory Parity Mandates that Section 20.6(a) Not Include Non-Covered SMR Carriers within the Spectrum Cap Since Those Carriers are Differently Situated From Covered SMR Carriers

The Commission has consistently held that in determining whether carriers in different services should be subjected to similar regulations, it looks to whether they are similarly situated.[37] Nevertheless, "considerations of parity do not require identical regulation of services that are differently situated."[38] While cellular, broadband PCS, and covered SMR services are similarly situated and serve the same two-way voice markets, non-covered SMR services are dissimilar. In the case of RAM Mobile, for instance, its 900 MHz SMR interests provide only two-way mobile data services. Technical design considerations preclude RAM Mobile from offering voice service

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[36] *See Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (holding that "where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach"); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 113 S. Ct. 57 (1992) (stating that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy"); *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (concluding that it is settled law that an agency may be forced to reexamine its approach "if a significant factual predicate of a prior decision . . . has been removed").

[37] *See Resale Order* at ¶ 15 (citing *Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1467-72 (1994)).

[38] *Id.; see also* H.R. Rep. No. 213, 103rd Cong., 1st Sess. 491 (1993) (recognizing that "market conditions may justify differences in the regulatory treatment of some providers of commercial mobile services").

which would enable it to compete with the voice services offered by cellular, broadband PCS, and covered SMR providers.

In *Cincinnati Bell Telephone Company v. FCC*, the United States Court of Appeals for the Sixth Circuit found that differences between services and technologies provide a rational basis for the Commission to treat carriers differently.[39] As the Commission concluded in the *Resale Order*, "differences in market conditions faced by classes of CMRS *other than* cellular, broadband PCS, and covered SMR providers warrant a decision not to apply the resale rule to these other carriers."[40] For the same reason, Section 20.6(a) of the Commission's rules should not include non-covered SMR carriers within the spectrum cap since those carriers are "differently situated."

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[39] *See Cincinnati Bell Telephone Company*, 69 F.3d at 765.

[40] *Resale Order* at ¶ 21

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission reconsider Section 20.6(a) of its rules to state that only "covered SMR" services are included in the 45 MHz CMRS spectrum aggregation limit, consistent with recent decisions in the resale, number portability, and roaming proceedings.

Respectfully submitted,

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